Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: August 14, 2002

GSBCA 15901

THOMAS D. McCLOSKEY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard D. Lieberman of McCarthy, Sweeney & Harkaway, P.C., Washington, DC, counsel for Appellant.

Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Judges **NEILL, DeGRAFF,** and **GOODMAN.**

DeGRAFF, Board Judge.

Pending is respondent's motion to dismiss this appeal for lack of jurisdiction. For the reasons set out below, the motion is granted.

Background[1]

Thomas D. McCloskey owns a building located in Baltimore, Maryland, that he leased to the General Services Administration (GSA). The lease began on September 1, 1994, and the tenant of the building was the Food and Drug Administration (FDA). Exhibit 1 at 1; Respondent's Statement of Facts ¶ 1; Appellant's Facts ¶¶ 1, 3. During the term of the lease, the FDA installed a security system control panel and card readers that the Government was permitted to remove any time before the termination of the lease. Respondent's Statement of Facts ¶ 2; Appellant's Facts ¶ 5. On July 23, 2001, GSA notified Mr. McCloskey that the lease would terminate on November 19, 2001. Exhibit 9.

Mr. McCloskey submitted to the GSA contracting officer a claim dated March 11, 2002, requesting $30,782 for "the cost of replacing property belong to Mr. McCloskey which the Government converted to its own use." Exhibit 12 at 1. The claim continued:

> During the term of the Lease, the Government installed a security system control panel and card readers ("security system property") in the premises. This security system property was installed as an alteration at the Government's expense. The term of the Lease expired on November 20, 2001. Paragraph 18 of the Lease gave the Government the right to remove alterations made by it "prior to the termination of the Lease." Since the Government did not remove the security system property by November 20, 2001, when the term of the Lease expired, the security system property was abandoned and became the property of Mr. McCloskey, as the owner of the building. On February 22, 2002, more than three months after the expiration of the Lease, Johnson Controls, Inc., a contractor hired and directed by the FDA, illegally entered the building where it removed the security system property and delivered it to the FDA. This action constitutes a conversion by the Government of Mr. McCloskey's property. Mr. McCloskey is entitled to be reimbursed by the Government for the cost of replacing the converted security system property.

Exhibit 12. On May 15, 2002, the contracting officer denied Mr. McCloskey's claim. Exhibit 14.

On June 14, 2002, Mr. McCloskey filed this appeal from the contracting officer's denial of his claim "for conversion (theft) by the Government of a security system." Notice of Appeal at 1. On July 3, 2002, Mr. McCloskey designated his March 11, 2002 claim as his complaint.

On July 16, 2002, GSA filed a motion to dismiss the appeal for lack of jurisdiction. GSA argues that the claim sounds in tort and not in contract. GSA points out that the claim is based upon an alleged conversion of property that occurred after the contract between GSA and McCloskey ended. Motion to Dismiss at 1-4.

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[1] The background facts are taken from the briefs of the parties and from the appeal file exhibits to which they refer.

On August 2, 2002, Mr. McCloskey filed an amended complaint and an opposition to GSA's motion to dismiss. In the opposition to GSA's motion, Mr. McCloskey says that the claim is a contract claim. In the opposition and the amended complaint, he says that the term of the lease did not expire in November 2001, and that GSA remained in possession of the premises until February 2002, when the FDA removed the security system property. In the amended complaint, Mr. McCloskey asks for rent of $83,477.31 for the period between November 2001 and February 2002, as an alternative to the cost of replacing the security system property. Opposition to Respondent's Motion to Dismiss at 5-7; Amendment to Complaint.

Discussion

We lack jurisdiction to consider Mr. McCloskey's claim for the cost of replacing the security system. In the claim that Mr. McCloskey submitted to the contracting officer, which Mr. McCloskey designated as his complaint here at the Board, he said that, more than two months after the lease expired, the FDA hired a contractor and directed it to enter the building illegally in order to convert the security system property to its own use. Conversion is the tort of wrongfully possessing or disposing of another's property as if it were one's own. Black's Law Dictionary 333 (7th Ed. 1999). We do not have jurisdiction to consider claims that sound in tort, unless there is a direct connection between the Government's alleged tortious conduct and the Government's express or implied contractual obligations. Okinawa Sunset Recording Studio & Productions, ASBCA 52343, 00-1 BCA ¶ 30,804. Mr. McCloskey has not pointed us to anything expressed in or implied by the contract that makes GSA responsible for the actions of someone, whether the FDA or its contractor or a professional criminal, who entered the building illegally after the lease expired and removed property that belonged to Mr. McCloskey. We conclude, therefore, that the conversion alleged by Mr. McCloskey is not directly associated with any contractual term. Because GSA's liability for the alleged tortious conversion of Mr. McCloskey's property does not depend upon any contractual promise that GSA made to Mr. McCloskey, we lack jurisdiction to consider the claim for the cost of replacing the security system.

We also lack jurisdiction to consider Mr. McCloskey's claim for rent, which is set out in his amended complaint. An appellant who comes to the Board can introduce new facts and new legal theories in support of the claim that was submitted to the contracting officer. An appellant cannot, however, raise a new claim that is based upon operative facts different from those that underlie the claim that was presented to the contracting officer. J.S. Alberici Construction Co., ENGBCA 6178, 98-2 BCA ¶ 29,875. This rule is meant to ensure that contractors allow contracting officers the opportunity to evaluate and to decide claims before contractors pursue appeals at the Board. 41 U.S.C. §§ 605, 607 (2000). The operative facts underlying the claim that Mr. McCloskey submitted to the contracting officer for the cost of replacing the security system would establish that GSA terminated the lease in November 2001, that someone entered the building illegally in February 2002, and that the person who entered the building took property that belonged to Mr. McCloskey. The operative facts underlying Mr. McCloskey's claim for rent would establish that GSA did not terminate the lease until February 2002, which would mean that the FDA contractor entered the building lawfully in order to remove the security system as allowed by the terms of the lease. The two claims are diametrically opposed. If Mr. McCloskey succeeds in establishing the facts needed to prove his claim for rent, he will have completely defeated his claim for the cost of

replacing the security system. Because Mr. McCloskey's claim for rent is based upon operative facts different from those that underlie the claim that he presented to the contracting officer, we lack jurisdiction to consider the claim for rent. If Mr. McCloskey wants to pursue his claim for rent, he should submit it to the contracting officer for consideration.

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

ALLAN H. GOODMAN
Board Judge